Nos. 16,113 and 16,114

United States Court of Appeals

For the Ninth Circuit

ANDREW J. LEONARD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
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Anchorage, Alaska,
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JURISDICTIONAL STATEMENT.

Appellant was convicted after trial by jury in the District Court for the District of Alaska, Third Judicial Division at Anchorage, Alaska. Jurisdiction below was conferred by 48 USC 101. Jurisdiction in this court is conferred by 28 USC 1291.

STATEMENT OF CASE.

This is a consolidated brief for the appellee in two appeals involving the same appellant, Andrew J. Leonard, both involving criminal proceedings against

appellant in what was then the District Court for the Territory of Alaska.

The first of these appeals is designated as appeal No. 16113 in this court (No. 3767 Criminal in the court below). Reference to the transcript of proceedings in this case will be made thus, (TR 13 p. 1).

The second of these cases is designated as appeal No. 16114 in this court (No. 3778 Criminal in the court below). Reference to the transcript of proceedings in this case will be made thus, (TR 14 p. 1).

No. 16113 involves a criminal proceeding based upon an indictment containing seven counts alleging violations of territorial law and one count alleging violation of a federal statute.

Count I, alleges violation of
Section 65-5-35 ACLA 1949
Breaking and Entering

Counts II, III, VI and VII, allege violation of
Section 65-6-1 ACLA 1949
Uttering and Publishing a forged instrument

Count V, alleges violation of
Section 65-5-42 ACLA 1949
Larceny in a building not a dwelling

Count IV, alleges violation of
Title 48 USC 199 (j)

Falsely securing a fishing license

Count IV was ordered dismissed by the trial court (TR 13 p. 211).

To these counts of the indictment the appellant pleaded Not Guilty, transcript of record No. 16113 p. 7, and defense counsel was appointed for him by the court.

He was tried before the District Court for the Territory of Alaska and a jury found him guilty of all counts except Count IV. From this judgment appellant appeals.

No. 16114 involves a criminal proceeding based upon an indictment containing a single count alleging a violation of Federal Statute 18 USC 2314, transportation of a forged instrument in interstate commerce, transcript of record No. 16114, pp. 1 and 2. The procedures followed in this case were the same as in No. 16113 except that the appellant was represented by a different defense counsel, also appointed by the court.

STATEMENT OF FACTS.

On June 16, 1957, the office of the William A. Smith Contracting Company was broken into (TR 13 p. 58) and eighty-five (85) payroll checks were taken (TR 13 p. 59). Some of the stolen checks were given to Joshua Davis by appellant (TR 13 p. 85). Later appellant admitted to Joshua Davis that he had committed the breaking and entering committing the burglary and had thus obtained the William A. Smith Contracting Company checks (TR 13 p. 88).

These checks soon began to appear in commerce in the City of Anchorage (TR 13 p. 81). The checks, when they appeared, had been forged (TR 13 p. 61). Ap-

pellant had been employed for a short time by the William A. Smith Contracting Company just prior to the burglary (TR 13 p. 62).

On May 11, 1957, appellant worked for a while at the Alaska Housing Authority (TR 13 p. 18). On that occasion he was left alone in the room next to the supply room (TR 13 p. 20). Shortly thereafter an inventory revealed that twenty-fve (25) to thirty (30) Alaska Housing Authority checks were missing (TR 13 p. 28). One of the missing checks was cashed by the appellant (TR 13 pp. 51 and 52) and the appellant was positively identified.

The appellant had a long list of convictions for similar offenses (TR 13 p. 288).

A complaint issued on June 26, 1957, in which the appellant was charged with violation of 65-6-1 ACLA 1949, forgery and uttering a forged instrument. Appellant was arrested, arraigned before the Deputy United States Commissioner, Warren Colver, and advised of his rights on June 27, 1957, and bail was set in the sum of $5000.00 (TR 13 p. 102 and TR 13 p. 119). Appellant made the bond on June 29, 1957 (TR 13 p. 218). After making the bond, appellant went to Fairbanks, Alaska. On June 13, 1957, his bondsman got off his bond and he was again taken into custody at Fairbanks (TR 13 p. 177). He was returned to Anchorage, Alaska, on July 16, 1957 (TR 13 p. 220).

On July 17, 1957, appellant, who was then confined in federal jail, caused a call to be placed to David Carpenter, the Treasury Agent, and in response to

this call, David Carpenter went over to the federal jail and saw the appellant who advised that he wanted to make a statement about some bank money orders. Pursuant to the appellant's request, Dave Carpenter informed agent, A. B. Clark of the Federal Bureau of Investigation on July 17, 1957 (TR 13 p. 178).

On July 18, 1957, appellant sent word to the Anchorage City Police that he wanted to get everything cleared up and give a statement relative to his activities (TR 13 p. 202). In response to this request, Detective Irmer of the Anchorage City Police, went to the Marshal's office and Deputy Marshal Johnson brought the appellant to the Marshal's office where, after again being advised of his rights, appellant voluntarily gave a confession to detective Irmer (TR 13 pp. 203-204). This is corroborated by the testimony of Deputy Marshal Johnson who was present at the time the confession was taken (TR 13 p. 124).

Agent Carpenter next received a call from the appellant and went to see him in federal jail on July 23, 1957, at which time appellant asked if his bond could not be reduced (TR 13 p. 179), at which time they agreed that the appellant would assist in some narcotic cases and Agent Carpenter addressed a request to the United States Attorney on August 2, 1957, to reduce the bail and bail was subsequently reduced.

The statement of facts in Case No. 16114 must of necessity be almost the same as in case No. 16113. The

main difference being in the offense charged and the agency to whom the appellant made his voluntary confession.

Here again the appellant secured employment with a janitorial service, this was the Clean Rite Janitorial Service (TR 13 pp. 6-8), who had a contract to clean the Tucker-Peterson Building which was occupied by Morrison-Knudsen Company (R 14 p. 7).

Shortly thereafter a Morrison-Knudsen check was cashed at the Sportland Amusement Company (R 16 p. 48). This was a Morrison-Knudsen check written against their account on the Seattle First National Bank at Seattle, Washington, in the sum of Two Hundred Eighty Five Dollars and one cent ($285.01) payable to the order of Joe Hill and bearing what purported to be the signature of Terrance McMullen (R 14 p. 27). This check was deposited in the First National Bank at Anchorage by the Sportland Amusement Company (TR 14 pp. 53-55). The check was then sent through the mail in interstate commerce to the Seattle First National Bank in Seattle, Washington, for collection (R. 14 pp. 68 through 87). This check had been partially prepared and before being signed an error had been noted and the check voided by cutting out the space for the signature (R 14 pp. 13 through 37). The appellant picked up this voided check, filled in the name of Joe Hill as payee, cut the signature from another voided check, pasted it in the space where the signature had been cut out and took it to the basement of the bus station and cashed it (R 14 pp. 151-152).

The appellant had been arrested on June 26, 1957, and charged with violation of 65-6-1 ACLA 1949, forgery and uttering a forged instrument, was arraigned by the Deputy United States Commissioner, Warren Colver on June 27, 1957, and bail set at $5000.00 (R. 13 p. 102 and p. 119). Appellant made the bond on June 29, 1957 (R 13 p. 218). After making the bond the appellant went to Fairbanks, Alaska. On June 13, 1957, his bondsman got off his bond and he was again taken into custody at Fairbanks (R 13 p. 177). He was returned to Anchorage on July 16, 1957 (R 13 p. 220).

On July 17, 1957, appellant placed a call to Treasury Agent Carpenter, and in response to this call Carpenter went over to the federal jail and saw the appellant who advised that he wanted to make a statement about some bank money orders. Pursuant to the appellant's request, Agent A. B. Clark of the Federal Bureau of Investigation was informed on July 17, 1957 (R 13 p. 178). Agent A. B. Clark, in company with Treasury Agent Carpenter, interviewed appellant on July 17, 1957, in the Marshal's office at Anchorage, Alaska, and the agent A. B. Clark after again advising the appellant of his rights, obtained a voluntary statement of the appellant (R 14 p. 92 and p. 133). Treasury Agent Carpenter next received a call from appellant and went to see him in the federal jail on July 23, 1957, at which time appellant asked if his bond could not be reduced (R 13, p. 179), at which time they agreed that appellant would assist Treasury Agent Carpenter in some narcotic cases and Agent

Carpenter addressed a request to the United States Attorney to reduce the bail on August 2, 1957, and bail was subsequently reduced (R 13 p. 180).

ARGUMENT.

I. THE TRIAL COURT DID NOT ERR IN CASE NO. 16113 IN ADMITTING INTO EVIDENCE THE VOLUNTARY CONFESSION OF THE APPELLANT. THERE WAS AMPLE COMPETENT EVIDENCE WITHOUT THE CONFESSION TO LINK THE APPELLANT WITH THE CRIMES ALLEGED IN THE INDICTMENT.

The record is replete with evidence to demonstrate that the confession was voluntary. It was testified by the Criminal Clerk in the United States Commissioner's Court, Lois Bradley, that her records revealed the appellant had been arraigned and advised of his rights on June 27, 1957 (R 13 p. 102). This is corroborated by the testimony of Warren Colver, the Deputy United States Commissioner who arraigned the appellant (R 13 p. 119). Appellant was further warned by detective Irmer (R 13 p. 204) which is corroborated by the testimony of Deputy Marshal Johnson (R 13 p. 192). As a matter of fact the appellant admitted he had even consulted with his own attorney (R 13 p. 217). The confession was not obtained until July 18, 1957, almost a month later (R 13 p. 207). Appellant's counsel would make much out of the lowering of the bail in their argument and although the bail was subsequently reduced so appellant could act as an informer for the police, in regard to narcotic violations, this was not even dis-

cussed with appellant until July 23, 1957, some five days after the confession was obtained (R 13, p. 180).

In federal courts there is no presumption against the voluntary character of a confession and the burden is not on the Government in the first instance to show its voluntary character; *Rhodes v. U.S.,* 224 F. 2d 348 (5th Cir. 1955). A confession is presumed to be voluntary; *Gray v. U.S.,* 9 F. 2d 337 (9th Cir. 1926).

Admissions or confessions of defendants in criminal cases, even after arrest, if voluntarily made are admissible in evidence. *Symons v. U.S.,* 178 F. 2d 615 (9th Cir. 1949), cert. denied 339 U.S. 985; *Fowler v. U.S.,* 239 F. 2d 93 (10th Cir. 1956).

Appellant in this portion of his argument (Brief p. 24) alleges there is a scarcity of corroborative proof as regards the confession. The true rule is all that is necessary is that the corroborative evidence must, of itself, tend to show appellant guilty as charged. *Wynkoop v. U.S.,* 22 F. 2d 799 (9th Cir. 1927); *Wiggins v. U.S.,* 64 F. 2d 950 (9th Cir. 1933).

Witness Harrison positively placed the appellant in the Alaska Housing Authority at the time of the crime at the place from which the checks were missing and that he was alone (R 13 p. 20). He was later identified by Dexter Holst as having cashed one of the stolen Alaska Housing Authority checks in the Spenard Cocktail Lounge (R 13 p. 52).

C. C. Stanley placed appellant at the William A. Smith Contracting Company for a period of three

days right before their firm was burglarized and the checks were taken (R 13 p. 62). Joshua Davis testified that appellant gave him four of the William A. Smith Contracting Company checks that had been stolen (R 13 p. 85), and that appellant admitted to Joshua Davis that he broke into the William A. Smith Contracting Company (R 13 p. 88). An examination of the records not only refutes the contention of appellant's counsel as to the scarcity of the corroboration but discloses corroboration so strong and so persuasive as to warrant conviction without the use of the confession.

II. IN CASE NO. 16113 THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S REQUESTED INSTRUCTION TO THE JURY WITH RESPECT TO THE VOLUNTARINESS OF THE CONFESSION BUT INSTEAD GAVE INSTRUCTION 15 WHICH WAS A PROPER INSTRUCTION ON THE FACTS.

On page 26 of appellant's brief, appellant complains of instruction 15 as given by the trial court and of the trial court's failure to give the instruction proposed by the appellant. Instruction 15 is found in its entirety on pages 21 and 22 of the Transcript of Record in case No. 16113. The instruction proposed by the appellant is found in its entirety on pages 32 and 33 of the Transcript of Record in case No. 16113. Objection was made to Instruction 15 as given by the trial court but no grounds were given for the objection, except that the court failed to give the proposed instruction presented by the appellant. Certainly the appellant did not comply with Rule 30 of the Federal Rules of Criminal Procedure by "stating

distinctly the matter to which he objects and the grounds for his objection," but if it is the pleasure of this court to consider this specification of error in spite of the non-compliance with rule 30 of Federal Rules of Criminal Procedure, it will be noted that every element contained in the proposed instruction will be found in Instruction 15 as given and as a matter of fact Instruction 15 is more susceptible of easy understanding by a lay jury, than is the proposed instruction and the appellant could not possibly have been prejudiced.

III. IN CASE NO. 16113 THE TRIAL COURT DID NOT ERR AND DID NOT ADMIT IN EVIDENCE, EVIDENCE OBTAINED DIRECTLY OR INDIRECTLY THROUGH AN UNLAWFUL SEARCH AND SEIZURE.

The appellant talks in general terms about prejudice because the police saw he had a fishing license in his possession made out in the name of Don Woods, which he admitted in his signed confession was obtained by giving the licensing people false information as to his identity (R 13 p. 208). It does not appear at any place in the record that the appellant objected to the police looking at the fishing license. It further appears that the license was never offered in evidence and that the papers dealing with the application for the license were excluded from evidence (R 13 p. 99) and as a matter of fact Count IV of the Indictment, the fishing license count, was dismissed by the trial court (R 13 p. 211). Nowhere in the record is there any indication, except in the argument of counsel, that there is or was any connection between the fishing li-

cense and the other vast array of evidence accumulated against the appellant. The police had knowledge of his presence in the community and of his presence at both the Alaska Housing Authority and the William A. Smith Contracting Company, just prior to the time the checks were taken. They were aware of his previous convictions for similar offenses so it is respectfully submitted that the Don Woods fishing license incident did not prejudice the appellant in any way.

The true rule is where the connection between the evidence sought to be introduced and the previous misconduct of the police is so attenuated as to dissipate the taint, the evidence should not be excluded, *Gregory v. U.S.,* 231 F. 2d 258 (Wash. D.C. Cir. 1956); *U.S. v. Place,* 263 F. 2d 627 (2nd Cir. 1959). That is certainly our case on our facts. It is respectfully submitted that there was no misconduct on the part of the police officers and if there had been misconduct, there is no connection between the Don Woods license incident and the balance of the evidence and certainly if there was previous misconduct on the part of the police it was so attenuated as to dissipate the taint.

IV. IN CASE NO. 16113 THE TRIAL COURT DID NOT ERR AND DID NOT FAIL TO PROTECT THE APPELLANT FROM INADMISSIBLE AND PREJUDICIAL TESTIMONY GIVEN BY THE COURT ATTACHE. THE TESTIMONY GIVEN BY THE COURT ATTACHE WAS PROPERLY ADMISSIBLE AND WAS NOT PREJUDICIAL.

The appellant complains that the trial court permitted a court attache to testify with respect to the

prior proceedings in the United States Commissioner's court. Lois Bradley is the party to whom the appellant refers and she was Clerk of the Criminal Records of the United States Commissioner's office and was official custodian of the records (R 13 p. 101). The subject matter to which she testified was as to the voluntary nature of the confession of the appellant which was shortly to be introduced. If the witness, Lois Bradley, had any information relative to this matter certainly she was a competent witness to testify to that information. In any event such testimony could not have prejudiced the appellant since her testimony was completely corroborated by Warren Colver, the then Deputy United States Commissioner (R 13 p. 119) and by the original of the Held to Answer papers in the trial court's file (R 13 p. 210) all of which show that the appellant was advised of his rights on June 27, 1957, by Deputy United States Commissioner Warren Colver, and the confession of the appellant was not given until July 18, 1957.

V. IN CASE NO. 16114 THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE VOLUNTARY WRITTEN CONFESSION GIVEN BY THE APPELLANT AND THERE WAS SUFFICIENT OTHER COMPETENT EVIDENCE TO FULLY CORROBORATE THE VOLUNTARY CONFESSION.

Admissions or confessions of defendants in criminal cases, even after arrest, if voluntarily made are admissible in evidence. *Symons v. U.S.,* 78 F. 2d 615 (9th Cir. 1949) cert. denied 339 U.S. 985; *Fowler v.*

U.S., 239 F. 2d 93 (10th Cir. 1956). Here the appellant had been arrested and was in custody at the time he gave the confession. He had been arrested on June 26, 1957, on case No. 16113 (R 13 p. 111) and had been taken before the Commissioner and arraigned on June 27, 1957, in accordance with Rule 5 of the Federal Rules of Criminal Procedure (R 13 p. 119).

The fact that the arraignment was on a different charge is not controlling, *U.S. v. Carignan,* 185 F. 2d 954 as modified by 342 U.S. 36 (9th Cir. 1950); *Tyler v. U.S.*, 193 F. 2d 24 (D.C. Cir. 1951).

In addition to the advice given by the Commissioner at the time of arraignment (R 13 p. 119) and being permitted to consult with his own attorney (R 13 p. 217) and having been further advised by Detective Mel Irmer (R 13 p. 204) which was corroborated by the testimony of Olaf Johnson (R 13 p. 192), he was further advised by Special Agent A. B. Clark of the Federal Bureau of Investigation (R 14 p. 92), which was corroborated by the testimony of Treasury Agent Carpenter (R 14 p. 133). After the appellant had been repeatedly advised of his rights by the Commissioner, by his own attorney, by detective Irmer and then by Agent A. B. Clark, the only conclusion that can be reached is that this was a voluntary confession.

In this portion of his argument, appellant also asserts that, but for his confession, there was no competent evidence to link the appellant with the crime. The true rule is that unless corroborated by independent evidence of the corpus delicti, the extra judicial confession or declaration of a defendant charged with

a crime are not sufficient to authorize a conviction but independent evidence need not be of itself sufficient proof of guilt but need only be a sufficient showing which *together* with defendant's confession or admission establishes the crime beyond a reasonable doubt. *Chevillard et al. v. U.S.,* 155 F. 2d 929 (9th Cir. 1946); *Evans v. U.S.,* 122 F. 2d 461 (10th Cir. 1941); *Smith v. U.S.,* 348 U.S. 147, Sup. Court 1954, viewed in the light of the true rule there was ample corroboration.

VI. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL FOLLOWING THE PROSECUTING ATTORNEY'S OPENING STATEMENT AND THE INSTRUCTIONS GIVEN BY THE COURT IN REGARD THERETO WERE CLEAR AND MORE THAN ADEQUATE.

The evidence outlined by the prosecutor in his opening statement was evidence which, under the facts of this case, should have been admissible.

The chief forms of offense connected with forged and other counterfeit documents are (1) making the false article, (2) passing it knowingly with intent to utter, and (3) knowingly uttering. Here the crime charged is in the last category. In all of them the criminal intent, including knowledge and other elements will be in issue, Wigmore on Evidence, Vol. 2, Section 309, 3rd Edition.

Evidence of similar transactions should be received for the purpose of showing intent, knowledge, motive, design or scheme where such element is essential to

the commission of the offense. Wigmore on Evidence, Vol. 2, Section 312, 3rd Edition. *Ehrlich v. U.S.,* 238 F. 2d 481 (5th Cir. 1956); *Hoyer v. U.S.,* 223 F. 2d 134 (8th Cir. 1955).

In any event, the objection was not timely made. Appellant and his counsel sat quietly by until the prosecutor had completed his opening statement and then asked for a mistrial. The objection, if appellant was going to object, should have been made when the prosecutor launched into his discussion, of what appellant conceived to be objectionable material. When actually made, it was not timely made. *Langley v. U.S.,* 8 F. 2d 815 (6th Cir. 1925); *Alberty v. U.S.,* 91 F. 2d 461 (9th Cir. 1937); *Noland v. U.S.,* 10 F. 2d 768 (9th Cir. 1926). The appellant may not sit idly by and gamble with a court result and then seek to have undone what has been done. *State v. Collins,* 10 F. Supp. 1007. Here the appellant chose to gamble and having done so and lost, cannot complain.

In any event, if the conduct complained of prejudiced the appellant in any manner, the prejudice was corrected by the prompt action taken by the trial court in instructing the jury to disregard the remarks of the prosecutor, prior to any further proceedings in the case (Supp. R 14 p. 29), and his further instruction at the close of the case (R 14 p. 188).

CONCLUSION.

Based on the foregoing reasons and authorities, the judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
December 4, 1959.

Respectfully submitted,

WILLIAM T. PLUMMER,
United States Attorney,
Attorney for Appellee.